United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2064

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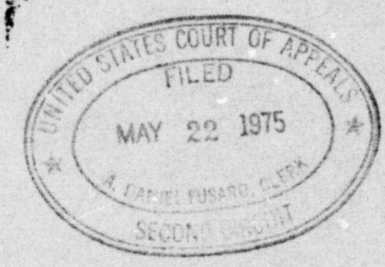
P/S

UNITED STATES ex rel.
ROBERTO S. DELGADO
v.
CARL ROBINSON, Warden

PETITIONER-APPELLANT'S BRIEF



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In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-2064

UNITED STATES ex rel.
ROBERTO S. DELGADO

Petitioner-Appellant

v.

CARL ROBINSON,
Warden of Connecticut
Correctional Institution
at Somers

Respondent-Appellee

On Appeal From The
United States District Court
For The
District of Connecticut

PETITIONER-APPELLANT'S BRIEF

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II. ISSUES PRESENTED FOR REVIEW.

1. Whether the Connecticut practice of permitting an accused to be present in the grand jury room and to examine witnesses, at the same time denying him the right to counsel, violates the constitutional requirements of due process, the right to counsel and equal protection of the law.

2. Whether the denial of a stenographer, recording device or other means to record the grand jury proceedings in a capital case, where the accused is present with the right to examine witnesses, constitutes a denial of the constitutional requirements of due process, the right to counsel and equal protection of the law.

3. Whether a warrantless arrest for a misdemeanor which was not committed in the presence of the arresting officer, having taken place several weeks earlier, violates the Fourth Amendment guarantee against unreasonable seizure.

4. Whether the doctrine of abatement and pardon should apply where a murder statute is repealed without the benefit of a savings clause.

III. STATEMENT OF THE CASE.

A. Nature Of The Case And Course Of Proceedings.

The petitioner was found guilty of murder in the first degree

on December 7, 1967 by a Connecticut statutory court composed of three judges. Upon appeal, the Connecticut Supreme Court affirmed. State v. Delgado, 161 Conn. 536, 290 A.2d 338 (1971).

The Supreme Court of the United States granted certiorari on June 29, 1972, and the judgment was vacated "insofar as it leaves undisturbed the death penalty imposed." Delgado v. Connecticut, 408 U.S. 940, 92 S.Ct. 2845, 33 L.Ed. 2d 764 (1972). Upon remand, the petitioner was sentenced to life imprisonment by a new statutory three-judge court.

On October 25, 1972, the petitioner filed a Motion to Dismiss for Lack of Jurisdiction (Ex. 1) and on October 31, 1972 a Plea in Abatement and/or Motion to Dismiss and/or Quash Indictment (Ex. 2), which motions were denied by the Connecticut Supreme Court on November 29, 1972. Said motions raised the issue as to whether the new statutory court, created upon remand of the case by the United States Supreme Court, had been properly and legally constituted, and whether the murder statute under which Delgado was convicted having been repealed without benefit of a specific savings clause, the doctrine of abatement was applicable.

The same issues were raised by petitioner before the sentencing panel on January 23, 1973, were fully argued before the court, and the court nevertheless resentenced petitioner to confinement for life.

Delgado filed his Petition for Writ of Habeas Corpus in the District Court for the State of Connecticut on April 24, 1973, together with a Motion for Permission to Proceed In Forma Pauperis, which motion was granted by the court on April 27, 1973. An evidentiary hearing was held before the court (Hon. Robert C. Zampano) on September 11, 1973. The petitioner testified and was cross-examined at this hearing and offered four exhibits consisting of his Motions to Dismiss before the Connecticut Supreme Court, referred to above, a copy of what purports to be a warrant of arrest, and the Connecticut Supreme Court Record (case No. 6566, State of Connecticut v. Roberto Delgado).

Following the submission of briefs by counsel, the District Court filed a Memorandum of Decision on February 18, 1975, denying the Petition for a Writ of Habeas Corpus. A Notice of Appeal from the judgment of the court was filed on March 12, 1975 and a Certificate of Probable Cause was duly executed and filed by the District Court (Hon. Robert C. Zampano) on April 15, 1975.

B. Statement Of Facts.

1. Background And Education.

Petitioner was born April 10, 1932, in Puerto Rico. His education was limited to the first year of high school in Puerto Rico, at which time he dropped out of school to support

his family by working as a sugar cane cutter. He came to the United States in 1960 or 1961, thereafter associating almost exclusively with Spanish-speaking persons. In August of 1967, he was employed at a plant nursery in Rocky Hill, Connecticut.

At all times relevant hereto, Delgado spoke practically no English and had a very limited understanding of spoken English. This language disability necessitated the use of an interpreter for him both before the grand jury and the statutory court at trial. (App. 26a, 35a.)

2. Offense.

On August 25, 1967, a Hartford police officer, Harvey Young, arrested the petitioner on a charge of breach of the peace without benefit of an arrest warrant. The arrest was based upon a warrant allegedly "on file" in the Hartford Police Department. A young boy had told Young about the warrant and he then checked it by radio. (App. 18a.)

Shortly after his apprehension, petitioner resisted what he claimed to be an illegal seizure of his person and a physical struggle ensued between himself and the police officer. In the course of this altercation, the police officer struck petitioner with his blackjack as well as his nightstick, whereupon petitioner gained control of the nightstick and struck the officer with it. (App. 20a.)

As the struggle continued on a public street in the City of Hartford, the two combatants wrestled each other to the ground. The police officer drew his gun and fired a shot at petitioner, striking him in the chest with a bullet. Petitioner managed to wrest control of the gun from the officer, shooting him four times, as a result of which the officer died. Delgado was admitted to the hospital in serious condition, with a bullet hole of entry in a very dangerous position, requiring surgery. (App.21a.)

3. Grand Jury Proceedings.

A bill of indictment against the petitioner was presented before a grand jury. In accordance with well-established principles of Connecticut common law and criminal procedure, petitioner was permitted to be present in the grand jury room to listen to the evidence and the interrogation of witnesses by the grand jury, with the right himself to propound questions to the witnesses. (See IV A, infra.)

The Hartford County Public Defender made a timely motion to be present with his client during the questioning of witnesses, and he requested the presence of a court stenographer during the grand jury proceedings. Both of these motions were denied. (App.16a.) Subsequent motions to quash on similar grounds were denied. (App.14a.)

Petitioner was in attendance throughout the grand jury proceedings during the taking of testimony. He was present with an interpreter (Casimir Sutula) since deceased. During the proceedings before the grand jury it was impossible for the interpreter to engage in simultaneous translation of what the witnesses were saying. (App. 35a.) In addition, Mr. Sutula spoke a different Spanish dialect from that used by petitioner and interspersed much of the "translation" with English words and terms totally incomprehensible to Delgado. (App.35a.)

Consequently, at the evidentiary hearing below, the petitioner testified that he did not understand what was going on in the grand jury room despite the presence and efforts of the interpreter. (App. 36a.) Nor could he possibly question any of the witnesses, some of whom he knew personally. (App.36a.)

Petitioner's health was also a factor. In addition to the severe chest wound he sustained requiring hospitalization and surgery, Delgado had a history of epileptic seizures requiring continuous resort to medication (Dilantin). (App. 23a.)At this time, he was suffering from a chronic brain syndrome which was sometimes acute, as well as epileptic deterioration and a brain abnormality of a permanent nature. (App.23a.) He had not had the benefit of Dilantin or equivalent medication during the period prior to, and during, the grand jury proceedings.

While in the grand jury room, he experienced pain from his wound as well as an ulcer condition. (App. 38a, 40a, 41a.)

The arrest warrant "on file" in the Hartford Police Department was not served upon petitioner until September 8, 1967, two weeks after Officer Young was killed (Ex. 3).

Petitioner has been in custody from the date of his arrest continuously to the date hereof.

IV. ARGUMENT.

Summary.

Although petitioner has raised a number of constitutional issues in the court below and upon this appeal, the denial of his right to effective representation of counsel is at the core of both. This initial illegal deprivation infected the grand jury proceedings, a critical stage in the process of his indictment and conviction of murder in the first degree. And this infection, in turn, was aggravated by denial to petitioner of a transcript of these critical proceedings, further impairing his constitutional rights to effective representation, to confrontation, to the preparation of his defense, and to a fair trial.

In addition, this appeal raises the question as to whether petitioner's warrantless arrest for a misdemeanor, allegedly committed weeks before the arrest, was in effect a "poisonous

tree" whose fruit ultimately took the form of conviction of first-degree murder. A secondary issue here is: was there a constitutional right to resist such a clearly unlawful arrest?

Finally, the murder statute under which petitioner was convicted (but not sentenced) having been repealed without benefit of a savings clause, the applicability of the doctrine of abatement and pardon is in issue upon this appeal.

A. CONNECTICUT PRACTICE OF PERMITTING ACCUSED TO BE PRESENT DURING GRAND JURY PROCEEDINGS AND TO EXAMINE WITNESSES, BUT DENYING RIGHT TO COUNSEL, VIOLATES CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS, RIGHT TO COUNSEL AND EQUAL PROTECTION.

Connecticut grand jury procedure is sui generis. Diligent research discloses no other state permitting the presence of the accused before a grand jury as a matter of course; indeed many jurisdictions forbid such presence by statute. 38 Am. Jur. 2d, Grand Jury §§ 32,34; Rule 6(d),F.R.Cr.P.

Federal and Connecticut grand jury procedure have nothing in common beyond their respective constitutional mandates.* Most significantly, the accused is customarily present and

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* The Fifth Amendment requires a grand jury indictment in the case of a "capital, or otherwise infamous crime ..." Article First, Section 8 of the Connecticut Constitution requires such an indictment in the case of "any crime, punishable by death or life imprisonment ..."

permitted to participate in Connecticut grand jury proceedings; he is absent under the federal rules. On the other hand, whereas the Government attorneys are present and control federal grand jury proceedings, they are excluded from the Connecticut grand jury room. The federal rule of secrecy denies to the defendant the nature of the evidence presented before the grand jury, whereas a Connecticut accused, being present during the grand jury proceedings, and having the opportunity to examine and cross-examine witnesses, is accorded full knowledge of and access to the evidence and testimony against him.

For at least 160 years, the grand jury in Connecticut capital cases has been directed to "cause the prisoner and the witnesses to come before you." Lung's Case, 1 Conn. 428 (1815). While denying the accused the right to counsel, the following direction was handed down by the then nine judges of the Connecticut Supreme Court:

> "You will permit the prisoner to put any proper questions to the witnesses, but not to call any witnesses on his part." Ibid.

This procedure, peculiar to Connecticut, has been continued by the "liberality of our practice ..." State v. Fassett, 16 Conn. 457 at 468 (1844), and has evolved into a right accorded to prisoners accused of capital offenses, a right which "is almost invariably exercised ..." State v. Stallings, 154 Conn. 272, 282

(1966); see, also, State v. Menillo, 159 Conn. 264, 277 (1970).

The grand jury is charged to exclude inadmissible evidence, being admonished to "restrict the evidence it elicits to that which is admissible in the trial of cases ..." State v. Kemp, 126 Conn. 60 at 71 (1939). Hearsay evidence is barred and, as a means of helping to guide the lay jurors, "usual Connecticut practice" assures the presence of "at least one" member of the bar on the grand jury so that "the exclusion of inadmissible evidence may well be achieved." State v. Menillo, supra, at 274, note 1; State v. Davies, 146 Conn. 137, 139 (1959).

1. Connecticut Practice Of Denial Of Counsel Before The Grand Jury Violates Due Process, Right To Counsel And Equal Protection.

The record demonstrates that, even before the grand jury was charged, counsel for petitioner moved to be present with Delgado at the grand jury proceedings, as well as for the presence of a court stenographer, and both motions were denied. (App. 16a.) Subsequent to these proceedings, the petitioner moved that the indictment be quashed or dismissed on the grounds of denial of counsel during his presence before the grand jury as well as denial of a stenographer, which motion was similarly denied. (App. 14a.)

As applied to this petitioner, the incompatibility of such

procedure with the pertinent constitutional provisions and principles of fairness is clear and unmistakable. At the time of his appearance before the grand jury, Delgado was newly recovered from surgery; he suffered from a chronic brain syndrome and ulcers; he was severely disadvantaged by a language barrier and understood little of what was being said. He wanted to question the grand jury witnesses but was unable to do so due to his physical, educational and language disabilities.

Petitioner's status before the grand jury in Hartford in August of 1967 was clearly that of a defendant de facto if not yet de jure. The grand jury was not conducting "a general inquiry into an unsolved crime" but had focused "on a particular suspect." Escobedo v. Illinois, 378 U.S. 478, 490 (1964). See, also, Miranda v. Arizona, 384 U.S. 436 (1966) and United States v. Wade, 388 U.S. 218 (1967). He was at a highly "critical stage". His rights to be present, to examine witnesses himself, to listen to the examination of witnesses, to take written and/or mental notes of testimony -- all without benefit of counsel and without adequate translation into Spanish of what was being said -- were no "rights" at all, but a sham and a mockery of justice.

Placed within this legal and factual context, the line of cases which holds that the right to counsel before grand juries is not constitutionally mandated, is totally inapposite. See

United States v. Scully, 225 F.2d 113, 115 (2d Cir. 1955); Gollaher v. United States, 419 F.2d 520, 523 (9th Cir. 1969), cert. den. 396 U.S. 960; and Harris v. Beto, 438 F.2d 117 (5th Cir. 1971); but cf. Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969), cert. den. 396 U.S. 1040.

Bearing in mind Connecticut's unique grand jury procedure above described, with the accused being present and having the right to examine witnesses in accordance with the rules of evidence, as well as the transparent status of Delgado's presence in the posture of much more than a mere suspect, the right to counsel would appear to be self evident. As the Supreme Court declared in its landmark right-to-counsel case in Powell v. Alabama, 287 U.S. 45 at 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law ... He is unfamiliar with the rules of evidence... He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." (Emphasis added.)

The United States Supreme Court, in the four decades since Powell, has shown an increasing recognition and awareness that an unaided layman should not be made to cope with an intricate procedural system. And recent developments have led that

Court to recognize that "Assistance" would be less than meaningful if it were limited to the formal trial itself. Thus, in Hamilton v. Alabama, 368 U.S. 52, 55 (1961), and White v. Maryland, 373 U.S. 59, 60 (1963), arraignment was held to be a "critical stage" of the proceedings, requiring the presence of counsel whether or not prejudice resulted from his absence. These decisions were followed in quick order by expansion of the counsel principle in Massiah v. United States, 377 U.S. 201 (1964), a Sixth Amendment case wherein a federal conviction affirmed by this Court was reversed, and soon thereafter by the Wade-Gilbe t-Stovall "trilogy".

In United States v. Wade, supra, the court ruled that an accused is entitled to the assistance of counsel at a pretrial line-up identification procedure. Noting the fact that its holding was not grounded upon the possibility of self-incrimination, the court stressed the need for expanding the constitutional guarantee of counsel in these terms, directly applicable to the case at bar:

> "Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than reflect a constitutional principle established as long ago as Powell v. Alabama ...' Massiah v. United States, supra, 377 US, at 205, 12 L.Ed. 2d at 250. It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the

> State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment--the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. Pointer v. Texas, 380 US 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065." 388 U.S. 218 at 226-7 (1967).

In Coleman v. Alabama, 399 U.S. 1 (1970), three uncounseled accused were granted a preliminary hearing before a county judge. They were neither required nor permitted to enter any plea. The primary purpose of a preliminary hearing under the Alabama law at that time was to determine "... whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury ..." Ibid., at 8; Ala. Code, Tit. 15, §§ 133-140 (1958). As the prevailing opinion by Justice Brennan points out, however:

> "The preliminary hearing is not a required step in an Alabama prosecution. The prosecutor may seek an indictment directly from the grand jury without a preliminary hearing. Ex parte Campbell, 278 Ala. 114, 176 So. 2d 242 (1965)." Ibid.

Nevertheless, and on this issue Justice Brennan was joined by five other Justices (only the Chief Justice and Justice

Stewart dissenting), the Court held this hearing to be a "critical stage" of the criminal process, requiring the provision of counsel. The majority opinion, citing Wade, reasoned as follows:

> "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination or cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by a skilled lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial ... The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid ... as at the trial itself.' Powell v. Alabama, at 57." Ibid., at 9-10.

Measured against Coleman, the case at bar presents itself a fortiori. Denial of counsel here did not occur at a hearing preliminary to presenting the case before the grand jury but at and before the grand jury itself! The proceeding in this case was and is constitutionally mandated, not, as in Coleman, discretionary with the prosecutor. The State itself characterized this grand jury proceeding as a hearing in probable cause. (App. 30a.) Delgado had been committed to the county jail to insure his

appearance and was a prisoner of the Connecticut Superior Court. Furthermore, his physical, mental, education and language problems further distinguish his case and strengthen its claims upon the Constitution in comparison with the accused in Coleman.

Although the homicide by petitioner was not in doubt during his grand jury hearing, the nature and degree of his offense was very much in doubt, running the gamut from legally justifiable assault to first degree murder. The "guiding hand of counsel" at this critical stage could easily have affected the nature of the indictment (if any) returned by the grand jury. Depending on whether a true bill was returned at all, the end result could foreseeably have been a plea or a trial on a lesser charge.

It makes no sense to suggest that indictment is not a critical stage of the criminal process. Can the State seriously contend that the right to counsel admittedly attaches to in-custody interrogation and identification, to preliminary hearings and arraignment, but somehow "leapfrogs" over the indictment procedure? See Jones v. United States, 342 F.2d 863, 870 (D.C. Cir. 1964). The law has its contradictions, but surely not to the point of such absurdity and not where fundamental constitutional rights are at stake.

It appears to be settled law that the States need not observe

the Fifth Amendment's provision for indictment by grand jury. Alexander v. Louisiana, 405 U.S. 625 (1972). However, as pointed out by the Court in Carter v. Jury Commission, 396 U.S. 320 at 330 (1970):

> "Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria ..." (Emphasis added.)

This principle was reiterated in a different context by Justice White, and conceded by the dissenting Justices as well, in the recent case of Goss et al v. Lopez et al, ____ U.S. ____, 95 S.Ct. 729 (1975). See, also, Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

More than eighty years ago, the Supreme Court characterized a grand jury proceeding as "a criminal case" within the meaning of the Fifth Amendment. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). Analogizing what the Court said there in the context of the Fifth Amendment privilege to the closely related rights guaranteed by the Sixth and Fourteenth Amendments, the guaranteed right to counsel "... is as broad as the mischief against which it seeks to guard." Ibid. See, also, In Re Gault, 387 U.S. 1, 34-42 (1966); Kirby v. Illinois, 406 U.S. 682, 689 (1970); and Argersinger v. Hamlin, 407 U.S. 25, 30-33 (1971).

Nor need petitioner demonstrate a specific showing of

prejudice from denial of counsel. This rule has been clear from at least as early as Glasser v. United States, 315 U.S. 60 at 76 (1942), where the Court held:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

While the Glasser case involved a federal prosecution, hence Sixth Amendment, right to counsel, this Circuit has specifically recognized that the Glasser rule applies to the review of state court murder convictions. Thus, in United States ex rel. Cooper v. Denno, 221 F.2d 626 at 628 (1955):

> "That such action (denial of counsel) resulted in no prejudice to the accused does not void or excuse the violation. Glasser v. United States ... Coplon v. United States, 89 U.S. App. D.C. 103, 191 F.2d 749, certiorari denied 342 U.S. 926..." (Parentheses added.)

2. Reliance On Groban, Scully and Stallings Is Misplaced.

The opinion below dispenses with the issue of Delgado's right to counsel by terse reliance on the following cases:

In re Groban, 352 U.S. 330, 333 (1957).

United States v. George, 444 F.2d 310, 314 (6th Cir. 1971).

Gollaher v. United States, 419 F.2d 520, 523 (9th Cir. 1969).

United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955).

United States ex rel. Stallings v. Reincke, (D. Conn, 1967, unreported).

In re Groban and Scully were decided in 1957 and 1955 respectively. Conceding the fact that this does not place these cases in the category of "ancient history", nevertheless the magnitude and scope of subsequent decisions by the Supreme Court reviewed above certainly raises serious questions as to their continued authority or even viability.

In Groban, a 5-4 majority held that persons need not be furnished counsel when called upon to give testimony as witnesses at a proceeding conducted by a state fire marshall investigating the causes of a fire. Putting aside the question which troubled the dissenters as to whether such proceedings "technically fit into the traditional category of formal criminal proceedings ..." (supra, at 344), it should be noted that the four dissenters in Groban became the majority in the later decisions of Hamilton, Escobedo, Miranda,* Wade* and Coleman, supra. Justice Reed, who wrote the prevailing opinion, actually spoke only for himself and two other Justices. Justice Frankfurter, who was joined by Justice Harlan, wrote a concurring opinion likening a fire marshall's investigation to workmen's compensation proceedings where

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* Justice Black's dissent in Groban is cited by the Court with approval in Miranda, supra, 466 at note 36, and United States v. Wade, supra, 231 at note 15.

"the presence of lawyers is deemed not conducive to the economical ... ascertainment of facts", and in the course of which he was careful to note that a fire marshall "is not a prosecutor ..." Ibid., at 336. It cannot seriously be suggested that, with its set of facts and shifting pluralities, Groban is controlling here.

Scully, decided two years before Groban, reasoned that "the mere possibility" that a witness before a grand jury may later be indicted furnishes no basis for according him the full panoply of constitutional rights. Judge Medina stressed the point that Scully had "no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal and ordinarily no requirement that the evidence introduced be only such as would be admissible upon a trial." Supra, at 116. Obviously, Delgado's situation was quite the reverse: his indictment was virtually certain and he was entitled to all of those rights under Connecticut law and practice.

Gollaher and George are readily distinguishable on their facts. The former is a Fifth Amendment case wherein the decision is grounded upon Rule 6(d), F.R.Cr.P. (discussed supra at pp. 8-9) citing Groban as authority. The latter is a civil contempt case wherein a broad grant of immunity was extended to the witness prior to requiring him to testify.

It is of interest to note that a more recent decision handed down by the Ninth Circuit has extended the right to counsel to civil contempt proceedings arising out of an indigent's refusal to answer questions put to him by a grand jury. In the matter of Grand Jury proceedings, United States v. Kang, 468 F.2d 1368 (9th Cir. 1972). Although the Court conceded that it could find no authority requiring the appointment of counsel under such circumstances, it concluded that there was such a right even in a civil proceeding, so long as the "threat of imprisonment is the coercion that makes a civil contempt proceeding effective." At 1369.

The State relies heavily on Stallings, as did the Court below, in holding that "petitioner's claim is foreclosed" by this decision. Memorandum of Decision, p.3. The Court denied Stallings' petition based on Connecticut's denial of his right to counsel on the grounds that "petitioner's contention that he has a right to the assistance of counsel at Grand Jury proceedings does not stem from any constitutional source ..." Although Wade was decided several months earlier, it is strangely ignored and not even distinguished in this very terse, three-page Memorandum of Decision. It must be presumed that Wade was never brought to the Court's attention.

It should also be noted that the Court in Stallings

arrived at its conclusion by starting from the major premise that "under federal law the possible accused has no right to appear ..." before the grand jury. And this is precisely the point! Under Connecticut law, the "possible accused" does have this right and invariably exercises it, thus presenting a wholly different pattern of procedure from that which obtains in the federal system.

Much more in keeping with the trend of the right-to-counsel decisions of the past decade is this Court's opinion in Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972), reversing a denial of a Connecticut habeas corpus petition. In that case, petitioner was identified by several witnesses while he was being detained in the "bullpen" in connection with a different crime. Despite the "informality" of this viewing procedure and the distinctly "preliminary stage" at which it occurred, this Court held:

> "This particular confrontation was ... at a 'critical stage', at least in the sense that petitioner was suspected of complicity in the crime, and had been identified in photographs by the two witnesses who then viewed him in person. The identification proceedings were, therefore, arguably at a point 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' Wade, supra, 388 U.S. at 224 ..." At 1027.

B. DENIAL OF STENOGRAPHER TO RECORD GRAND JURY MINUTES IN CAPITAL CASE CONSTITUTED DENIAL OF DUE PROCESS, EQUAL PROTECTION AND EFFECTIVE ASSISTANCE OF COUNSEL.

The denial of counsel to petitioner was aggravated and prejudice to petitioner compounded by denial to him of a stenographic or other record of the grand jury proceedings. This could only serve to deprive this petitioner, uneducated and incomprehending as he was, of several vital tools for his defense, inter alia:

1. Inconsistencies and contradictions in the testimony of the witnesses;

2. Bias on the part of one or more of the grand jurors;

3. Knowledge of illegally obtained or otherwise tainted evidence;

4. Exculpatory information or evidence;

5. Preservation of testimony favorable to him from a witness who might not later appear at trial;

6. Constitutional right to bail. (Conn. Const.,Art. First, Sec. 8.)*

A transcript or record of the grand jury proceedings, particularly where, as here, petitioner did not comprehend what was

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* On the special relationship between Connecticut bail procedures in capital cases and the presence of the accused before the grand jury, see State v. Menillo, 159 Conn. 264, 278-9 (1970).

taking place and what evidence was being presented before the grand jury, was essential not only as a matter of due process and equal protection, but in order to implement the Constitutional mandate of effective representation of counsel.

1. Effective Representation Of Counsel.

The process of indictment is a critical stage of criminal proceedings where important rights may be sacrificed or irretrievably lost.

Denial to counsel of access to testimony before the grand jury, intially in the form of physical exclusion and subsequently by way of absence of a transcript, necessarily deprives him of any practical means with which to test the legal validity of the indictment itself. Particularly where his client is uneducated, seriously disabled by reason of a language bar, and suffering from a chronic brain syndrome, how is counsel to test the propriety of the grand jury proceedings, the legality and/or sufficiency of the evidence, and whether or not constitutional or other legal rights have been violated? Indeed, there is at least one Court of Appeals decision which suggests that prejudice may logically be presumed in the absence of grand jury minutes because of the consequent inability to challenge the legality of its proceedings. Maestas v. United States, 341 F.2d 493 (10th Cir. 1965).

Although, concededly, there is no requirement under Rule 6 of the Federal Rules of Criminal Procedure that testimony before the grand jury be transcribed verbatim, several decisions of this Circuit have reiterated that a stenographic record is the better practice "as a matter of course ..." United States v. Cramer, 447 Fed.2d 210, 214 (2d Cir. 1971, cert. den., 404 U.S. 1024 (1972)). Professor Moore has noted that "fairness to the defendant would seem to compel a change in the Rules, particularly in view of the increasingly permissive use of minutes for purposes of impeachment." 8 Moore's Federal Practice, Sec. 6.02 (2) at 6-11.

The primary rationale underlying the Federal Rules in this regard, namely, the tradition of grand jury secrecy, is obviously irrelevant to the Connecticut procedure which places the accused in the grand jury room to observe and hear all of the testimony. There is no danger of his escape or of his tampering with the witnesses. Nor is there any kind of realistic hazard by way of disclosure of derogatory information presented to the grand jury since the accused is not sworn to secrecy and, depending upon his intelligence, education, note-taking, retentive ability, memory, and other factors, can and should pass on to his attorney all of the information to which he is automatically made privy under Connecticut's unique procedure.

With the veil of secrecy thus pierced if not destroyed, the only purpose served by a denial of a transcript is the impairment of an accused's ability to make effective use, through counsel, of the evidence presented. The net effect is a dilution of effective representation by counsel in violation of the Sixth and Fourteenth Amendments. In the particular case of petitioner, this rule as applied constituted a more substantial and prejudicial deprivation of his fundamental right to a fair trial with full capacity for impeachment of witnesses than in the case of some better educated and fully comprehending accused in a similar situation.

2. Due Process.

There has been a clearly discernible trend in constitutional law in the direction of "disclosure rather than suppression, of relevant materials ..." in order to insure fairness in the "proper administration of criminal justice." Dennis v. United States, 384 U.S. 855, 870 (1965).

Two years earlier, the Supreme Court treated the suppression by the government of evidence favorable to the accused as a violation of due process, regardless of good faith. Brady v. Maryland, 373 U.S. 83, 87 (1963). The Brady rule was specifically applied to pre-trial statements of a government witness which were inconsistent with the testimony of that witness at trial.

Giles v. Maryland, 386 U.S. 66, 74-6 (1967).

In the same year that the Giles decision came down, the Court of Appeals for this Circuit directed that a defendant thenceforth should "be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material ..." United States v. Youngblood, 379 F.2d 365 at 370 (2d Cir. 1967); see, also, Allen v. United States, 390 F.2d 476, 482 (D.C.Cir. 1968).

The State of Connecticut, however, is in a position to avoid the due process requirements of Brady, Dennis, Giles and their progeny, by the simple method of refusing to provide a stenographer. And yet, no compelling reasons can reasonably be offered for the State's refusal to provide an accused with a record of the grand jury proceedings. The secrecy argument, as already noted, is senseless given the presence of the accused. As a practical matter, constitutional grand jury hearings (as in the case at bar) are limited to charges of murder and kidnapping; hence the provision of a stenographer to record such infrequent proceedings would hardly impose a significant economic burden upon the State. But even if it did, it is doubtful that this Court would hold that the constitutional right to due process and equal protection (see infra) must defer to economic considerations. No

administrative problem is presented since stenographers are always used to record the judge's charge to the grand jury and, as a matter of mechanics, might simply remain in the grand jury room to record the testimony thereafter.

3. Equal Protection.

The special and peculiar disability of petitioner, confronting a possible first-degree murder charge as a result of the killing of Officer Young, has already been underscored. The denial of a transcript to him was peculiarly prejudicial, denying him the same protection afforded other capital offenders better equipped to comprehend and record the proceedings before them. Compare United States ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

Furthermore, it should be noted that Connecticut has long recognized the right of an accused to a transcript of a preliminary hearing. For more than ten years, an accused in this State has been entitled to a stenographic record of "any proceedings in the Circuit Court ..." which would, of course, include hearings in probable cause. Conn. Gen. Stat., Sec. 51-70a.

The effect of this statutory provision is to guarantee to an accused the right to a stenographer and a transcript of any probable cause hearing. On the other hand, such a transcript is consistently denied to an accused such as petitioner at the probable-cause-hearing equivalent in the case of murder, namely

the indictment stage itself. In effect, therefore, a murder defendant is denied that which a larceny or drug defendant is guaranteed.

Such procedural anomalies can hardly be reconciled with the constitutional guarantee of equal protection of the laws.

C. SINCE PETITIONER'S ARREST WAS A WARRANTLESS ARREST FOR BREACH OF PEACE, A MISDEMEANOR, BASED ON A WARRANT "ON FILE", PETITIONER'S ARREST WAS ILLEGAL, HE HAD THE RIGHT TO REMOVE HIMSELF FROM CUSTODY, AND BOTH CHARGE AND CONVICTION FOR FIRST-DEGREE MURDER WERE ILLEGAL.

The Fourth Amendment guarantees the security of the individual against unreasonable seizure and clearly stresses the importance of a warrant as a proper basis for apprehension and police custody. If, as petitioner claims, he was illegally arrested without a warrant for a misdemeanor offense,* he had the right to attempt to regain his liberty and, as the dissenting opinion in State v. Delgado, supra, correctly asserted, he "had a right to resist the arrest." (At 556.)

Under the facts and circumstances of this case, if indeed there was an illegal arrest importing a right to resist, the charge and conviction of murder in the first degree cannot pass

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* The warrant "on file" charged petitioner with breach of the peace (see Exhibit 3), in violation of Conn. Gen. Stat., Sec. 53-174, carrying a maximum penalty of one year.

constitutional muster on Fourth and Fourteenth Amendment grounds.

The Connecticut Supreme Court in its affirmance recognized and then proceeded to abrogate the common law rule that an officer making an arrest pursuant to warrant must have the warrant in his possession, a rule supported by "substantial authority." Supra, at 544. See 6 C.J.S., Arrest, Section 4(c); 5 Am. Jur. 2d, Arrest Section 72; 4 Wharton, Criminal Law and Procedure, Section 1617 at 282; and Fisher, Laws of Arrest, Section 54 at 114-15.

Petitioner knows of no state which has changed or overturned this rule except by statute.* Connecticut would appear to be the first jurisdiction to attempt to do so by judicial decision.

The pertinent Connecticut statute (Conn. Gen. Stat., Sec. 6-49) maintains the misdemeanor-felony dichotomy and reflects the common law rule. In its relevant portion, it provides as

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* Illinois (Ill. Rev. Stat., C.38 Section 107-2)
Colorado (Colo. Rev. Stat., Section 39-2-20)
Iowa (Iowa Code Ann., Section 755.4)
Louisiana (La. Code of Crim. Proc., art. 213)
New York (N.Y. Crim. Proc. Law, Section 140.10)
Missouri (Mo. Rev. Stat., Sections 84.440, 84.090)
Hawaii (Hawaii Rev. Stat., Section 708-5)
Georgia (Ga. Code Ann., Section 27-207)
Nebraska (L.B. 395, Section 2)
Wisconsin (W.S.A. 968-07)
Michigan (M.C.L.A. Section 674.15)

follows:

> "Sheriffs, deputy sheriffs, county detectives, constables, borough bailiffs, police officers, special protectors of fish and game and railroad and steamboat policemen, in their respective precincts, shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when such person is taken or apprehended in the act or on the speedy information of others, and members of the state police department or of any local police department or county detectives shall arrest, without previous complaint and warrant, any person who such officer has reasonable grounds to believe has committed or is committing a felony."

Thus, a warrant of arrest was required since the misdemeanor was not committed in the presence of the officer and the arrest was not based on speedy information. Like the common law, the Connecticut warrantless arrest statute bars an arrest for a misdemeanor even though the officer has probable cause.

The dissenting opinion by Judge Klau places the issue of petitioner's warrantless arrest, his subsequent altercation with the arresting officer, and the tragic consequences which followed, in the proper constitutional context:

> "There is no great public urgency in the apprehension of criminals charged only with the commission of a misdemeanor to require the reversal of the overwhelming weight of authority, especially in a capital case where the death penalty has been imposed. At the time the defendant was placed under arrest, he had committed no crime in the presence of the officer and was not charged with the commission of a felony. The warrant at headquarters was for breach of the peace, a misdemeanor. Had he not been arrested at that time, he easily could have been arrested at a later time under

> the warrant, as he was not a fugitive from justice at the time and had a known place of abode. Consequently, the defendant had a right to resist the arrest. The majority opinion states that the defendant did not raise the question of his right to resist arrest at the time of trial. In a capital case claimed error should be considered even though not assigned in order to assure a fair trial. State v. Reid, 146 Conn. 227, 235, 149 A.2d 698 ...
>
> "Subsequent events must be viewed in the light of an illegal arrest, especially in the light of the court's finding on the hearing with respect to the imposition of penalty that the defendant was an individual who had a brain abnormality which required dilantin to keep him under control; that he had not taken dilantin for more than a year prior to the date of the killing; and that he had a chronic brain syndrome." State v. Delgado, supra, at 556-7.

Thus, the very seizure of the petitioner ab initio was constitutionally suspect. In addition to the Fourth Amendment issue which it raises, quaere whether, as a matter of due process, petitioner could legally be held to respond to a charge of murder in the first degree in the face of his well-recognized common-law right to resist arrest.

The court below cites Frisbie v. Collins, 342 U.S. 519, 522 (1952) and the "settled" federal rule that a "fugitive from justice" may be arrested without benefit of physical possession of an arrest warrant. In the first place, there is not a shred of evidence in the record that Delgado was a fugitive from justice. Second, Frisbie is incorrectly cited in this context, being an in personam jurisdiction case, rather than one dealing

with the substantive issue of the right to resist an unlawful arrest. Third, this Court in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), while acknowledging that Frisbie has not been expressly overruled, stated that it had lost much of its vitality, inter alia, because the Supreme Court's "... decisions in Rochin and Mapp unmistakably contradict its pronouncements in Frisbie ..." Ibid., at 274. See also opinion by Judge Friendly in United States v. Edmons, 432 F.2d 577, 583 (2d Cir. 1970).

The case of Whiteley v. Warden, 401 U.S. 560 (1971) is cited by the court below for the proposition that "it is sufficient if the officer, as in this case, acts in response to information transmitted to him by radio message or bulletin." The short answer to this is (a) the fact that the arrest in Whiteley was held to be illegal and the conviction reversed, and (b) the statement by Justice Harlan for the 6-3 majority that "... an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." Ibid., at 568.

D. THE DOCTRINE OF ABATEMENT AND PARDON IS APPLICABLE SINCE MURDER STATUTE UNDER WHICH PETITIONER WAS CONVICTED WAS REPEALED WITHOUT BENEFIT OF SAVINGS CLAUSE.

Petitioner was originally convicted under the provisions of

Conn. Gen. Stat., Sec. 53-10. On October 1, 1971, while his appeal was pending before the Connecticut Supreme Court and prior to its affirmance on December 7, 1971, Section 53-10 was repealed without the benefit of a savings clause. A new and very different capital offense law took effect on that same date containing provisions for the trial and punishment of homicide offenses totally at variance both in form and content from the prior statute. (See, e.g., Conn. Gen. Stat., Sec.'s 53a-45, 35(b)(1), 35(c)(1), 53a-5 to 53a-23 inclusive, and 53a-47).

The doctrine of abatement has long been recognized by the federal courts as well as by the United States Supreme Court itself. As recently as March of 1973, the Supreme Court had occasion to deal with the issue and reiterated this fundamental principle of the common law in the following terms:

> "At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition in the highest court authorized to review them. See Bell v. Maryland, 378 U.S. 226, 230, 12 L.Ed. 2d 822, 84 S.Ct. 1814 (1964); Norris v. Crocker, 13 How. 429, 14 L.Ed. 210 (1851). Abatement by repeal included a statute's repeal and reenactment with different penalties. See 1 J. Sutherland, Statutes and Statutory Construction § 2031 n 2 (3d ed 1943). And the rule applied even when the penalty was reduced. See, e.g., The King v. M'Kenzie, 168 Eng. Rep. 881 (KB 1820); Beard v. State, 74 Md. 130, 21 A 700 (1891)." Bradley v. United States, 410 U.S. 605 at 607-8 (1973).

In order to avoid abatement the state legislatures invariably indicate an intention not to abate pending prosecutions

by including in the repealing statute a specific savings clause. This the Connecticut Legislature failed to do with the enactment of the Penal Code, other than Section 53a-4 of the Code which reads as follows:

> "Savings Clause. The provisions of this chapter shall not be construed as precluding any court from recognizing other principles of criminal liability or other defenses not inconsistent with such provisions."

Obviously, this is barely a slim reed on which to rely as a means of saving Section 53-10, if it is a reed at all. Hence, the State relies, as did the court below, on the general savings statutes set forth in Conn. Gen. Stat., Sec.'s 1-1 and 54-194 to avoid the consequences of the statutory omission.

It should be noted that Section 1-1 took effect in 1881 and Section 54-194 took effect ten years earlier. The provisions of Section 1-1 read as follows:

> "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed."

The provisions of Section 54-194 are as follows:

> "The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect."

In the first place, it should be noted that neither of these general savings clauses meets the common law and Supreme Court requirements that a criminal statute which has been repealed can only be "saved" by "a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated." Bradley v. United States, supra, at 608.

Second, even if this Court were to decide that these general savings clauses do have application to the case at bar, under standard rules of statutory construction, only the later of the two (Section 1-1) would be applicable. See Simborski v. Wheeler, et al, 121 Conn. 195, 198-9 (1936). This being the case, petitioner must fall within one of two categories spelled out in Section 1-1, namely:

1. That he had incurred a "punishment, penalty or forfeiture" before the repeal took effect, or

2. That there was a "prosecution or proceeding pending at the time of the repeal."

The only punishment which the petitioner had incurred prior to repeal was the court's death sentence. No other "punishment, penalty or forfeiture" had been incurred. This punishment having been declared a violation of the cruel and unusual punishment clause of the United States Constitution by the United States Supreme Court, it became void and of no legal effect - a nullity.

Turning to the "prosecution or proceeding pending" provision of the savings clause in question, it is self-evident that no "prosecution" was pending against the petitioner at the time of repeal. The trial was concluded and sentence imposed.

The only real question, therefore, is whether there was a "proceeding" pending sufficient to resuscitate Section 53-10 under Section 1-1. It cannot be denied that such a proceeding was in fact pending at the time of the repeal, namely, the petitioner's appeal to the Connecticut Supreme Court. This "proceeding" was concluded with the rendering of the decision by that Court on December 7, 1971, exactly sixty-eight days subsequent to repeal of Section 53-10 by the State Legislature.

Respondent may argue that this "proceeding" in turn was followed by another "proceeding" in the form of the petition for certiorari to the United States Supreme Court filed in petitioner's behalf on May 1, 1972. However, it stretches both language and logic to the breaking point to assert that this subsequent appeal can be treated as a "proceeding pending" within the meaning of Section 1-1 since it is beyond dispute that the petition for certiorari was not "pending at the time of the repeal."

But even if this Court were to decide that the subsequent certiorari proceedings before the United States Supreme Court were sufficient to keep this case within the saving grace of

Section 1-1, a tortured application of the words of the statute at best, these proceedings in turn were terminated as of that Court's decision on June 29, 1972, and there were no proceedings pending thereafter until the appointment of a new sentencing court.

Thus, Section 1-1, fairly construed, avails the State nothing, in that it served to "save" the statute for purposes of the appellate proceeding but for no other purpose once the appeal was terminated. Whether a "prosecution" or a "proceeding" under Section 1-1, the term clearly imports a beginning and an end. Bradley v. United States, supra.

Moreover, it should be noted that savings clauses are subject to the strictest construction by the courts, a fortiori in criminal cases. They are in derogation of the common law. The Supreme Court of the United States had just such a savings clause before it in Bell v. Maryland, supra, wherein Justice Brennan, speaking for a 6-3 majority, warned that any such clause must be "... narrowly construed - especially since it is in derogation of the common law and since this is a criminal case ..." At 234.

Although the principle of abatement is very old, it is not archaic but "continuing and vital." United States v. Chambers, 291 U.S. 217 at 226 (1934). Our courts have perennially

concluded, and oftentimes with deep and candid regret, that in the case of a penal statute which is repealed pending an appeal and before the final action of the appellate court, such repeal will actually prevent the affirmance of conviction and the prosecution must be dismissed or judgment reversed. See Taney, C.J., in Maryland v. Baltimore & Ohio R.R. Co., 3 How, 534 at 552 (1845). In that case, the court held, in language very similar to that which it employed in the Bradley decision over a century later, that a judgment does not become final until affirmed by the appellate court and if, during the interim, the Legislature repeals the statute under which prosecution was had, it operates as a discharge of the defendant. See, also, United States v. Reisinger, 128 U.S. 398, 401 (1881); Hand v. City of Rock Hill, 379 U.S. 306, 312 (1964); and United States v. Auerbach, 68 F.Supp. 776 (D.C. Calif. 1946), the last case construing the general savings statute in the U.S. Code.

V. CONCLUSION.

This case is a case of first impression. The issues of law which it presents are substantial and involve basic constitutional protections for the rights of an accused.

The case at bar confronts this Court with a clear denial of constitutionally guaranteed rights. It presents an opportunity

for review of a unique State procedure as applied to an indigent, poorly educated, disabled, Spanish-speaking accused, who was afforded the opportunity to be present before an indicting grand jury, a right customarily granted to capital offenders in Connecticut since 1815, but who was denied counsel and transcript.

Petitioner argues that the issues of the harmfulness of the error which flowed from these constitutional deprivations is a matter of "nice calculation" barred by Glasser and its progeny. However, within the context of the facts of this case, wherein the homicide arose following a warrantless and therefore illegal arrest, the prejudice resulting from such violations of petitioner's rights may scarcely be doubted.

Given timely assistance of counsel, it is doubtful in the extreme that petitioner would have been indicted for the crime of murder in the first degree, let alone convicted of this crime and sentenced to death. The original indictment constituted the "poisonous tree" and the death sentence constituted its fruit. What occurred before the grand jury in petitioner's case was critical in determining the ultimate result.

The milestone decision of Jones v. Cunningham, 371 U.S. 236 (1963) is repeatedly cited for its oft-quoted statement that the remedy of habeas corpus "is not now and never has been a static,

narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against the erosion of their rights to be free from wrongful restraint upon their liberty." Similarly, in Fay v. Noia, 374 U.S. 391 at 401-2, the Supreme Court described the function of the Great Writ as being:

> "... to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."

For all of the foregoing reasons, and based on the authorities presented, it is respectfully requested that this honorable Court reverse the judgment of the Court below with instructions that a writ of habeas corpus should be issued so as to discharge petitioner from further detention and restraint.

PETITIONER-APPELLANT

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CERTIFICATION

This is to certify that the undersigned attorney for the Petitioner-Appellant, and a member of the firm of Wofsey, Rosen, Kweskin & Kuriansky, served a copy of the foregoing Petitioner-Appellant's Brief on John D. LaBelle, attorney for the Respondent-Appellee, on the 21st dav of May, 1975.

Emanuel Margolis

Emanuel Margolis

Dated at Stamford, Connecticut
this 21st day of May, 1975.